STATE OF MICHIGAN

COURT OF APPEALS

PIONEER STATE MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED March 18, 2003
v	No. 220477 Presque Isle Circuit Court
TIMOTHY C. SPLAN and DEIDRA SPLAN, Defendants/Counter-Plaintiffs-Appellants.	LC No. 95-002005-CZ ON REMAND

Before: Saad, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Our Supreme Court remanded this case for us to reconsider this Court's ruling in *Pioneer State Mut Ins Co v Splan*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2001 (Docket No. 220477). On reconsideration, we affirm the trial court's grant of summary disposition to Pioneer.

I. Facts and Procedural History

As set forth in the prior opinion, the Splans insured their double-wide, prefabricated home through Pioneer since they purchased the house in 1982. The record reflects that the Splans themselves added onto the home and built, among other things, a laundry room and extended the sheet metal roof of the original structure over the new space. The parties agree that, in December 1993, the Splans heard a loud cracking sound and noticed a crack in the drywall of their living room ceiling, which was part of the original, prefabricated structure. The parties also agree that, in the summer of 1994, the Splans heard another loud cracking sound and observed that the ceiling crack grew longer and wider and that the roof developed a severe sag.

On November 23, 1994, the Splans submitted a proof of loss statement to Pioneer and asserted that their roof "collapse" was caused by a "build up of ice and snow." The Splans obtained a repair estimate of $74,638.51 from Dana Nutt at D & T Construction. The parties agree that the Splans' home had structural problems before the roof cracked and sagged. After the Splans filed their claim, Pioneer sent a professional engineer, Roswell Ard, Jr., to inspect the damage. Ard concluded that there were numerous, latent structural defects in the home before the Splans purchased it. He observed that these defects caused the roof to sag in two places in

the original structure. Pioneer denied coverage for the loss and, thereafter, filed a complaint for declaratory judgment regarding the contractual rights of the parties. The Splans then filed a countercomplaint and asserted claims of estoppel and fraud. Specifically, the Splans alleged that the policy issued by Pioneer is illusory, unconscionable and ambiguous.

On January 19, 1996, Pioneer filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), and argued that there is no genuine issue of material fact regarding the cause of damage to the Splans' home and that the policy does not cover losses caused by latent defects or faulty design or construction. In response, the Splans argued that, regardless whether structural defects may have contributed to the loss, the policy covers a "collapse" caused by the weight of ice or snow. At the motion hearing, Pioneer's attorney stipulated that the ice and snow on the roof of the house contributed to the damage, but maintained that the damage did not amount to a "collapse" under the policy.

On May 8, 1996, the trial court entered an opinion granting partial summary disposition to Pioneer. Specifically, the trial court ruled that there is no genuine issue of material fact that latent structural defects caused the damage. The court further ruled that the Splans' losses are not covered by the policy because the policy excludes losses caused by faulty design or construction as well as losses caused by settling, cracking, shrinking, bulging or expansion.[1]

On appeal, the Splans argued that the trial court erred as a matter of law in finding no coverage under the policy's collapse provision within the Additional Coverages subsection. In this Court's prior opinion, the panel ruled that the undefined policy term "collapse" is ambiguous and that, therefore, it should be construed against the insurer, Pioneer, and in favor of the insured, the Splans. To that end, the prior panel reasoned that, because of the extensive damage to the home and because a "home need not be reduced to a pile of rubble for it to be in a state of collapse," the Splans raised a genuine issue of material fact regarding whether the home collapsed. As noted, our Supreme Court vacated this Court's prior opinion and directed us, on remand, to reassess the prior panel's conclusion that the undefined policy term "collapse" is ambiguous. *Pioneer State Mut Ins Co v Splan*, 467 Mich 902; 653 NW2d 414 (2002).

II. Meaning of "Collapse"

On reconsideration, we hold that the undefined policy term "collapse" is not ambiguous. The disputed policy language states:

> We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
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> ***
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> d. weight or contents, equipment, animals or people;

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[1] The trial court later granted Pioneer's second motion for partial summary disposition on the Splans' countercomplaint. However, as this Court observed in the prior opinion, the arguments in this appeal concern the first grant of partial summary disposition on the issue of coverage.

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Collapse does not include settling, cracking, shrinking, bulging or expansion.

The construction and interpretation of an insurance contract is a question of law that we review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). As our Supreme Court correctly observed in its remand order:

> The fact that a policy does not define a term does not render the term ambiguous. *Henderson*, [*supra* at 354]. Rather, reviewing courts must interpret such a term in accordance with its commonly used meaning. *Id*. Further, a term is not ambiguous merely because it is susceptible to different commonly used meanings where, through application of rules of judicial interpretation, one of these meanings can be discerned as that intended by the parties. [*Pioneer, supra* at 902.]

It is well-settled that, in interpreting the terms of an insurance policy, the court "shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided." *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1997). To discern the "ordinary and plain meaning" of a particular policy term, it is appropriate to consult a dictionary definition. *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994). The *Random House Webster's Unabridged Dictionary* (1998), offers the following definition of collapse:

> 1. to fall or cave in; crumble suddenly . . . . 3. to break down; come to nothing; fail . . . .

We conclude that the undefined policy term "collapse," is not ambiguous and is properly defined by the commonly-used meaning set forth in the dictionary definition above, and as unambiguously qualified by the policy itself to exclude certain specific incidents such as "settling, cracking, shrinking, bulging or expansion." Accordingly, further construction of the policy language is unnecessary and the policy must be enforced as written. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

III. Issues of Fact and Law

A. Standards of Review

Our Supreme Court also directed this panel to determine whether the Splans established a genuine issue of material fact regarding "(1) the cause of the damage to defendants' home; (2) whether a collapse occurred causing damage to defendants' home; and (3) whether the policy covered such damage." *Pioneer, supra* at 902.

We review a trial court's grant of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As our Supreme Court also explained in *Maiden*:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this

> subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden, supra* at 120.]

In cases involving the application of a term in an insurance policy, our Supreme Court further explained in *Henderson, supra* at 353:

> It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993). Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists. *Id*.

B. Causation

As a preliminary matter, we note that both parties have attempted to enlarge the record on appeal by submitting or relying upon evidence not before the trial court when it ruled on the motion for summary disposition in May 1996.[2] "In ruling on a motion for summary disposition, a court considers the evidence then available to it," and will not consider evidence filed after the ruling. *Quinto, supra* at 366 n 5. Accordingly, on appeal, this Court will not consider evidence that was not presented to the trial court for its consideration before its ruling. *Id*.

Regarding the cause of damage to the Splans' home, we hold that the trial court did not err by granting summary disposition to Pioneer. When the trial court granted Pioneer's motion, it had before it the Splans' proof of loss claim which stated that ice and snow build up caused the damage. The Splans made similar, unsupported assertions in their complaint and briefs in response to Pioneer's motion.[3] However, Pioneer submitted a report by professional engineer

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[2] We reject the Splans' assertion that Pioneer's motion for summary disposition was premature because discovery was not yet complete. At the time Pioneer filed this motion, several sworn statements, depositions and reports were complete and available to submit to the trial court. The record reflects, however, that much of this evidence was not submitted at all or not submitted until well after this motion was decided.

[3] According to an unsupported statement in their brief and a similar unsupported allegation in their complaint, after they heard the crack, the Splans "went outside and observed a great deal of accumulated ice and snow on their roof." We note that Pioneer also made unsupported statements in its pleadings below. In its motion, Pioneer makes the uncorroborated statement that the Splans "admit that the amount of snow on the roof at the time of the loss was not unusual and that it was only their guess at the time of filing the claim that the ice and snow caused the problems . . . ." In support thereof, Pioneer cites "Defendants' testimony under oath" and indicates that the testimony is attached as "Exhibit A." Pioneer's Exhibit A contains some of Deidra Splan's sworn statement, but there is no statement or admission regarding the amount of snow on the roof.

Roswell Ard, Jr., in which he found that "[t]here is no evidence that the weight of ice and snow during immediately preceding winters produced the damage that was observed." Pioneer also submitted the testimony of the Splans' contractor, Dana Nutt, who agreed that, based on the severe structural problems with the house, there was no way he would expect the roof to support any snow or even the weight of the roof itself. The evidence clearly showed that the primary cause, if not the only cause of damage to the Splans' home was the significant structural defects in the home which existed long before the crack developed in December 1993.

We recognize that, at oral argument on its motion for summary disposition, Pioneer's counsel stipulated that ice and snow was a contributing factor in the damage. While this stipulation of fact is normally binding on the parties and on the trial court, *Nuriel v Young Women's Christian Ass'n of Metropolitan Detroit*, 186 Mich App 141, 147; 463 NW2d 206 (1990), we hold that the trial court correctly concluded that it was of no consequence to the outcome of the motion. First, the assertion was clearly belied by the evidence before the trial court. The Splans submitted no admissible evidence regarding the amount of ice or snow on the roof or the extent it contributed to the damage. Rather, all the admissible evidence indicates that, regardless whether snow fell on the house, the roof was so structurally deficient that it could not support itself.

More importantly, however, the courts of this state have rejected the "concurrent causation" theory in the context of insurance liability. See *Vanguard Ins Co v Clarke*, 438 Mich 463, 473-474; 457 NW2d 48 (1991). As a matter of law, if one cause is covered by a policy, it does not nullify another, unambiguously excluded cause in the insurance policy. *Id*.; see also *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 695; 327 NW2d 286 (1982). The policy provides:

> ADDITIONAL COVERAGES
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> ***
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> 9. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
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> ***
>
> d. weight or contents . . . .
>
> ***
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> SECTION I – PERILS INSURED AGAINST
>
> COVERAGE A – DWELLING and
> COVERAGE B – OTHER STRUCTURES
>
> We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:
>
> 1. involving collapse, other than as provided in Additional Coverage 9;

2. caused by:

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[f.] (2) inherent vice, latent defect, mechanical breakdown;

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3. excluded under Section I- Exclusions.

The "Section I – Exclusions" provision states that:

> 2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
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> ***
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> c. Faulty, inadequate or defective:
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> ***
>
> (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
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> (3) materials used in repair, construction, renovation or remodeling . . . .

As reflected in the language of the policy, while a "collapse" caused by the weight of ice or snow may be a covered loss under the policy, the unambiguous policy exclusion for latent structural defects and faulty design or construction clearly preclude coverage here. As is clear from the policy language itself, Pioneer provides coverage for a collapse caused by a specific, listed condition, but unequivocally excludes coverage for collapse caused by any other condition not listed in the collapse provision. Moreover, the policy expressly sets forth an exclusion for which Pioneer will not provide coverage, which specifically includes latent defects and faulty design and construction. "An insurance policy must be enforced in accordance with its terms" and "[w]e will not hold an insurance company liable for a risk it did not assume." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999) (citations omitted). The trial court correctly granted summary disposition to Pioneer on this issue because there is no genuine issue of material fact regarding the cause of the damages in this case and Pioneer is entitled to judgment as a matter of law. MCR 2.116(C)(10).

C. No "Collapse" Occurred

Were we to find that ice and snow caused the damage here, coverage is nonetheless precluded because, as the trial court correctly ruled, a "collapse" did not occur within the meaning of the policy. At the time it considered the motion, the trial court had before it Ard's report in which he stated that the ceiling cracked and the roof sagged in two places because of settling in areas with missing, broken or cut rafter beams or trusses. Ard further reported that a

missing bearing wall and missing or inadequate foundational beams contributed to the roof sag. The Splans submitted the affidavit of Deidra Splan, in which she testified that, since the initial crack appeared in December 1993, "the small split in [the] ceiling has become a large crack which extends the length of the room that gapes and sags." Mrs. Splan further stated that her kitchen countertops now pull away from the walls, the walls bow outward, the roof sags, the outer siding has cracked and water seeps through the cracks in the roof and ceiling. Finally, Mrs. Splan asserted that twenty contractors refused to repair the home and she offered hearsay statements of one of the contractors and Roswell Ard who allegedly told her "that a cave-in was imminent."

Under the commonly-used definition of the term set forth in Section II, a collapse did not occur because the house did not fall down or cave-in, suddenly crumble or break down. The plain and ordinary meaning of collapse also contemplates a sudden event which, in this case did not occur. Rather, while a cave-in may well have been "imminent" after the Splans filed their insurance claim, the record reflects that the damage began, at the latest, in December 1993 and continued for months until the Splans installed temporary bracing. Further, as described by Roswell Ard, the damage appears to be excluded under the explicit terms of the policy because the initial crack in December 1993 triggered the sagging, "settling, cracking . . . [and] bulging" which resulted in the Splans' insurance claim. Again, if the terms of the policy are clear and unambiguous, "[w]e will not hold an insurance company liable for a risk it did not assume." *Frankenmuth, supra* at 111.[4] Clearly, the policy excludes coverage for the damage at issue here.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

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[4] For this reason, we find unpersuasive plaintiff's reliance on *Vormelker v Oleksinski*, 40 Mich App 618; 199 NW2d 287 (1972). *Vormelker* is not binding on this court because it was decided before 1990 and, moreover, the definition the Court adopted in that case included bulging and cracking, both of which are clearly excluded under this policy. See MCR 7.215(I)(1). Furthermore, unlike *Vormelker*, the damage in this case, while expensive to repair, was not so extensive as "to render it unsuitable for use as a home." *Id*. at 631. Indeed, no evidence indicates that the Splans stopped living in the house at any time. Further, unlike the house in *Dagen v Hastings Must Ins Co*, 166 Mich App 225; 420 NW2d 111 (1988), the Splans' house was not "so impaired as to destroy the efficiency of [the] home as a habitation." *Id*. at 231.